

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

WILLIAM M. NASH,

Plaintiff,

Case No: 1:08-cv-132

v

HON. JANET T. NEFF

COMMISSIONER OF SOCIAL SECURITY,

Defendant.

OPINION

Plaintiff filed a claim for disability insurance benefits (DIB). The Commissioner of the Social Security Administration denied his claim, and plaintiff seeks judicial review of the decision. 42 U.S.C. § 405(g). The matter was referred to the Magistrate Judge, who issued a Report and Recommendation, recommending that this Court affirm the Commissioner's decision. The matter is presently before the Court on plaintiff's objections to the Report and Recommendation. In accordance with 28 U.S.C. § 636(b)(1) and FED. R. CIV. P. 72(b)(3), the Court has performed de novo consideration of those portions of the Report and Recommendation to which objections have been made.¹ The Court denies the objections and issues this Opinion and Judgment pursuant to FED. R. CIV. P. 58.

Plaintiff first argues that the Magistrate Judge erred in essentially excusing the ALJ's violation of the treating physician rule on the basis of the minimal objective findings of Dr. Bereza

¹ Plaintiff incorporated his objections into his previous briefs on the merits, making it more difficult to discern plaintiff's specific objections to the Report and Recommendation (Pl's. Objs. 2). The Court addresses only those objections expressly presented. Further, the Court does not have the benefit of responsive argument to plaintiff's objections.

and previous treators since 2002 (Pl's. Objs. 9 (citing R & R 12-15)). Plaintiff asserts that this "style of reasoning" is defective in a number of respects: (1) it is an impermissible attempt to uphold an ALJ's findings based on reasons not given by the ALJ; (2) the Magistrate Judge's reliance on minimal objective findings ignores the truism that it is not objective findings that disable a person, but the pain resulting from the same; and (3) the Magistrate Judge's citation to minimal objective findings impermissibly "cherry-picks" the record (Pl's. Objs. 9-10).

Plaintiff's argument is without merit. The Magistrate Judge's reasoning is sound. The Magistrate Judge found that the ALJ did not violate the treating physician rule and that the ALJ gave very good reasons for according little weight to Dr. Bereza's February 21, 2005 assessment (R & R 11). Further, the Magistrate Judge's findings were based on the ALJ's express evaluation of the opinion evidence in this case in accordance with 20 C.F.R. § 404.1527 and SSR 96-2p² (R & R 12 (citing A.R. 19-25)). The Magistrate Judge properly reviewed the record evidence as did the ALJ, in reaching their determinations.

The Magistrate Judge did not attempt to uphold the ALJ's findings on reasons not given by the ALJ. To the contrary, the Magistrate Judge properly considered plaintiff's arguments under the controlling law, while recognizing that plaintiff was entitled to "good reasons" for the minimal weight accorded to the treating physicians' opinions, and specifically the medical assessment of Dr. Bereza. *See Smith v. Commissioner*, 482 F.3d 873, 875 (6th Cir. 2007) ("[c]laimants are entitled to receive good reasons for the weight accorded their treating sources independent of their substantive right to receive disability benefits"). The Magistrate Judge's citation to "minimal objective findings" does not reflect a defect in reasoning or "cherry-picking" of the record, but instead reflects

² *See Titles II and XVI: Giving Controlling Weight to Treating Source Medical Opinions*, SSR 96-2p (reprinted at 1996 WL 374188 (SSA July 2, 1996)).

a considered review of the record and plaintiff's entitlement to "good reasons" for the lack of weight accorded to the treating sources in this case.

Plaintiff also contends that the Magistrate Judge erred with respect to the "finding" that "[e]ven an uncontradicted treator's opinion may be rejected if not 'well-supported by medically acceptable clinical and laboratory diagnostic techniques'" (Pl. Objs. 11-12 (citing R & R 15)). The Court finds no error. The Magistrate Judge did not improperly support the ALJ's decision by reasons not relied on by the ALJ. Rather, the Magistrate Judge considered whether the ALJ's determinations were proper under controlling law. Those determinations included whether Dr. Bereza's opinion was inconsistent with the other substantial evidence in the case record and whether the ALJ gave "good reasons" for the weight accorded to the restrictions specified in Dr. Bereza's February 2005 assessment. *See* 20 C.F.R. § 404.1527(d)(2).

In a cursory statement, plaintiff takes issue with the Magistrate Judge's conclusion that the ALJ had an adequate basis for rejecting plaintiff's subjective complaints (Pl's. Objs. 18). This was a matter of credibility and properly considered as such by the Magistrate Judge. The Magistrate Judge noted that the ALJ "provided a detailed and lengthy discussion of her reasons" for her credibility determination (R & R 18). Upon review, the Court finds no error.

Finally, the Court finds no basis for remanding this case. Despite the lack of any developed argument by plaintiff on this claim of error, the Magistrate Judge comprehensively addressed the merits of this issue (R & R 6-10). On review, the Court agrees that remand is unwarranted as plaintiff has failed to establish that the October 23, 2007 progress report is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding. 42 U.S.C. § 405(g).

The Magistrate Judge properly recommended that the Commissioner's decision be affirmed.

A Judgment will be entered consistent with this Opinion.

Dated: June 1, 2009

/s/ Janet T. Neff
JANET T. NEFF
United States District Judge

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JUDGMENT

In accordance with the Opinion entered this date:

IT IS HEREBY ORDERED that plaintiff's objections (Dkt 11) are DENIED, the Report and Recommendation of the Magistrate Judge (Dkt 10) is APPROVED and ADOPTED as the opinion of the Court, and the decision of the Commissioner of Social Security is AFFIRMED.

Dated: June 1, 2009

/s/ Janet T. Neff

JANET T. NEFF

United States District Judge